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I.

Applicant-Intervenors fully support the recommendation by the OIC Staff that all of the Applicants for Intervention be permitted to participate in the adjudicative hearing. Applicant-Intervenors also acknowledge the reasonable concerns of the OIC Staff to promote efficiency in the proceeding on the proposed Premera conversion. While the Applicant-Intervenors appreciate the OIC Staff suggestion that intervenors be combined into two groups, a "provider" group and a "consumer" group, a minority of the Applicant-Intervenors believe their interests to be adverse to some or all of the other Applicants within the group combination proposed by the OIC Staff.² Applicant-Intervenors believe it to be ethically prohibited for an "attorney-in-charge" to represent the disparate interests in their particular combination.³ See Rules of Professional Conduct 1.7.

For this reason, Applicant-Intervenors propose that, for discovery purposes, there be a Washington consumer and provider group, ⁴ an Alaska group, ⁵ a Hospital Associations' group⁶

¹ Applicant-Intervenors submit this joint brief to present efficiently their response to the statutory arguments regarding intervention presented in the OIC Staff Response and the Premera Opposition. Applicant-Intervenor groups will supplement this joint brief to address individual issues.

² Many of the Applicant-Intervenors have joined the Premera Watch Coalition and signed a common set of principles in order to identify their similar interests. Declaration of Eleanor Hamburger, Exhibit 1. Although the Premera Watch Coalition members think it highly unlikely, it is possible that after discovery, potential differences could arise. For these reasons, Applicant-Intervenors ask the Insurance Commissioner to include a process for permitting a member of the proposed groups to proceed separately on important issues, upon a showing of good cause.

³ See Hospital Associations' Supplement to Joint Reply Brief in Support of Motion to Intervene.

⁴ The Washington Consumer and Provider Group would be composed of Washington Citizen Action, Welfare Rights Organizing Coalition, American Lung Association of Washington,

and the Washington Physicians group.⁷ The University of Washington has requested a limited scope of participation in the proceeding and specifically has stated that it does not intend to conduct discovery. As recommended by the OIC Staff, each group would have an attorney-incharge and would work together and with other groups and parties to ensure that the discovery process is efficient and wherever possible, without any duplication of the efforts already underway by the OIC staff and their experts. The Applicant-Intervenors strongly agree with the OIC staff recommendation that a pre-hearing conference be held to discuss whether any limitations on discovery are necessary.

In stark contrast to the reasonable approach to the motions for intervention taken by the OIC staff, Premera argues that <u>none</u> of the applicants for intervention should be allowed to participate in the adjudicative process. Indeed, under Premera's arguments, it is hard to imagine

Northwest Federation of Community Organizations, Northwest Health Law Advocates, Service Employees International Union Washington State Council, The Children's Alliance, Washington Academy of Family Physicians, Washington Association of Churches, Washington Protection and Advocacy System, Washington State NOW and the Washington Association of Community and Migrant Health Centers. All these organizations, except the Washington Association of Community and Migrant Health Centers, are members of the Premera Watch Coalition, which includes both consumer and provider organizations.

⁵ The Alaska group would be composed of the United Way of Anchorage, Anchorage Neighborhood Health Center, John Garner and the University of Alaska. The Applicant-Intervenors recognize that the interests of the Alaska groups may diverge from those of the Washington groups over issues of differing health impact between the two states and the allocation of Premera's non-profit assets if the Premera conversion is permitted to proceed. The Alaska group agrees to be combined with the Premera Watch Coalition on all common issues, such as the valuation of Premera.

⁶ The Hospital Associations' group would be composed of the Washington State Hospital Association and the Association of Washington Public Hospital Districts.

⁷ The Washington Physicians' group would be composed of the Washington State Medical Association.

that any individual or organization could qualify to participate in the conversion hearing, despite the clear statutory language that permits such participation.

Premera fails to identify a single jurisdiction where consumer and provider groups sought participation in an adjudicative hearing process and were denied the ability to participate.⁸ In fact, in every jurisdiction where a health care conversion of this magnitude has been proposed, groups of the kind that seek intervention here have been allowed significant participation in the process.⁹

Premera bases much of its argument against any intervention on a general mischaracterization of the Wisconsin conversion hearing. It argues that since the Wisconsin Insurance Commissioner denied "intervention" status to groups seeking participation in that hearing, so too must the Washington Insurance Commissioner. See Premera Opposition at 14. However, the Wisconsin Insurance Commissioner's jurisdiction for the hearing was not based

⁸The District of Columbia (DC) case referred to by the Washington Consumer Groups' Memorandum in support of Motion to Intervene is the <u>current</u> proposed conversion of Carefirst and sale to Wellpoint, in which DC Appleseed has been granted <u>full</u> participation rights. <u>See</u> Declaration of Eleanor Hamburger attached to Memorandum in Support of Motion to Intervene, Exhibit 7. Premera confuses the reference with an earlier hearing about whether the nonprofit DC Blue Cross/Blue Shield plan should have a business agreement with the nonprofit Maryland Blue Cross/Blue Shield plan, a transaction that did not raise the same significant issues as a conversion. Moreover, the petitioners for intervention in that earlier case did not allege that they represented any policyholders of the nonprofit health insurer. Despite these differences, the intervenors were permitted to participate. <u>Fair Care Found.</u>, A.G. v. D.C. Dep't of Ins. & <u>Securities Reg.</u>, 716 A.2d 987 (D.C. 1998).

⁹ <u>See</u> Conversion and Preservation of Charitable Assets of Blue Cross and Blue Shield Plans: How States Have Protected or Failed to Protect the Public Interest, Consumers Union, November 2002, available at http://www.consumersunion.org/health/bcbs1102.htm (describing the involvement of consumer and provider groups in adjudicative hearings on conversions in Maine,

JOINT REPLY TO OIC STAFF RESPONSE AND PREMERA OPPOSITION TO MOTIONS TO INTERVENE - 5

upon the Wisconsin Holding Company Act, and the relevant statute did not specifically provide for intervention, as do the Washington Holding Company Acts. Moreover, the Wisconsin Insurance Commissioner <u>permitted</u> the consumer and provider groups participate in a manner similar to that of parties, allowing them to conduct discovery, cross-examine and present witnesses, and make argument.¹⁰

As shown previously and below, Applicant-Intervenors have significant interests that are affected by the proposed Premera conversion and that their involvement in the adjudicative proceeding will be efficient, helpful and in the interests of justice. Applicant-Intervenors are confident that their participation will result in useful, important information necessary to assist the Insurance Commissioner with his decision regarding the proposed Premera conversion, a

Wisconsin, New Hampshire, Kansas, Georgia, Missouri, Colorado, and Washington DC, among others).

¹⁰ In referring to the three parties that sought intervention in Wisconsin, including the two state medical schools and a coalition of consumer interests, the Wisconsin Insurance Commissioner said:

[e]ach of these organization has valuable input to offer in this process. The two medical schools can offer insight into how the original plan proposed by Blue Cross would operate. They also have unique insights into health issues of the citizens of the state. In addition, the coalition has conducted research not only on Blue Cross Blue Shield United of Wisconsin but on conversions in other states, they've assembled experts, and offered important insight into many of the issues at are central to the consideration of this proposal...Fortunately, OCI [Office of the Commissioner of Insurance] has broad discretion to structure the review process to maximize participation by organizations such as those represented by the petitioners.

Transcript of <u>In the Matter of Application for Conversion of Blue Cross and Blue Shield United of Wisconsin</u>, Case No. 99-C26038, November 29, 1999 at 5-7, *available at* http://oci.wi.gov/bcbsconv/ah112999.pdf [hereinafter Wisconsin Hearing Transcript].

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transaction of enormous public interest to Premera enrollees, participating providers, other health care consumers, and the general public.

II. ARGUMENT

A. Applicants who demonstrate that they have a significant interest affected by the proposed Premera conversion are entitled to intervene in the adjudicative proceeding.

Both Washington State Holding Company Acts afford persons whose "significant interest" is determined by the Insurance Commissioner to be affected by the change of control of a health carrier the right to participate in the adjudicative proceeding on the transaction. RCW 48.31C.030(4); 48.31B.015(4)(b). These specific statutes govern the participation of parties in the hearing in addition to the health carrier and the OIC staff. Applicant-Intervenors meet the legal standard for "significant interest" as described in Washington case law. 11 Moreover, every other available source of interpretive material supports intervention as well.

1. *The dictionary meaning of "significant" supports the Motions for Intervention.*

Applicant-Intervenors agree with the OIC Staff that the Insurance Commissioner may look to the dictionary definition of the term 'significant' for guidance in this matter. OIC Staff Response at 9; State v. Chester, 82 Wn. App. 422, 427, 918 P.2d 514, 517 (1996) ("Where a statute does not define a nontechnical word, we may look to the dictionary for guidance."); see also "Bill Drafting Guide," Office of the Code Reviser at 25, (2001) available at http://slc.leg.wa.gov/BillDraftingGuide/RCWBDG.htm#X2.10.H.

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"meaningful," "important" or "of noticeably or measurably large amount," or "probably caused by something other than mere chance." See Merriam-Webster Dictionary online, available at http://www.m-w.com/cgi-bin/dictionary. Similarly, the American Heritage online dictionary defined "significant" as "meaningful," or "having a major effect; important." See American Heritage Dictionary online, available at http://education.yahoo.com/reference/dictionary/ entries/03/s0400300.html. Under these dictionary definitions of "significant," all Applicant-Intervenors have demonstrated their significant interest in the proposed Premera conversion.

According to the Merriam-Webster online dictionary, the term "significant" means

2. The Insurance Commissioner has broad discretion to determine whether a significant interest is affected by the proposed transaction

Applicant-Intervenors have demonstrated that, if the proposed Premera conversion is permitted to move forward as currently described by the publicly available documents, their interests will certainly be affected. However, even if the Insurance Commissioner determines that at this stage their interests are *potentially* affected, Applicant-Intervenors urge the Insurance Commissioner to adopt the position of the OIC Staff that "[I]t is unfair to place on a party the burden to demonstrate how its interest will be affected when the information about the transaction is still incomplete and not fully analyzed." OIC Staff Response at 11. See also Fritz v. Gorton 8 Wn. App. 658, 661-62 (1973)(The League of Women Voters demonstrated that it would be affected by a legal challenge to Initiative 276, when it alleged that it supported

¹¹ Some Applicant-Intervenors argue that the Insurance Commissioner should follow the decision in Kueckelhan v. Federal Old Line Insurance Co., 69 Wn.2d 392, 418 P.2d 443 (1966), in which the Court commented that "policyholders, its creditors and the public have a significant *interest*" in insurance company activities. (emphasis added).

Initiative 276 and as a lobbyist, it would be potentially affected because it could use the information generated by the Initiative to further its legislative objectives).

3. Premera's position should be rejected because, under its argument, no one would ever qualify as having a significant interest.

Premera does not offer a definition of the term "significant interest" and merely proceeds to argue that none of the Applicant-Intervenors demonstrate a "significant interest." Premera Opposition at 11-38. While Premera concedes that the Holding Company Act authorizes the Insurance Commissioner to permit the participation of parties with "significant interest" affected by the transaction, Premera Opposition at 11-12, it argues, without any legal support, that "significant interest" is a much stricter standard than exists in any other jurisdiction that has dealt with conversion transactions. Premera Opposition at 12-14.

This is simply untrue. For example, the statutory framework in Wisconsin is narrower than that in Washington state. In Wisconsin, the conversion hearing process did not proceed under its Holding Company Act, Wis. Stat. § 617, but instead under a special statute permitting the conversion of domestic stock and mutual corporations, Wis. Stat. § 611.76. The Wisconsin conversion law did not authorize intervention of parties, but permitted any policyholder to present oral and written statements as part of the hearing process. Wis. Stat. § 611.76(6). Unlike Washington's Holding Company Acts, the statute did not explicitly authorize policyholders to conduct discovery and examination of witnesses. Id. The Wisconsin Administrative Procedures Act does permit Intervenors within administrative proceedings, but requires a showing of "substantial" interest in order to participate. Wis. Stat. § 227.44 (2m). Yet, even in Wisconsin, consumer and provider groups were permitted to participate in the hearing, conduct discovery, present witnesses, cross-examine and make argument. Wisconsin Hearing Transcript at 6-7.

Premera's proposed conversion, the first health carrier conversion in Washington State,¹² is an extraordinary event that will impact a majority of Washingtonians and Alaskans, including Premera enrollees, providers, health care workers, other health care consumers, Medicaid and Basic Health plan enrollees, and rural and disabled consumers, among many others. Consumers and providers have a significant interest in the outcome of the review process, which is unlike any transaction previously considered under Washington's Holding Company Acts.

Given that many jurisdictions have recognized the obvious need for groups just like the Applicant-Intervenors to participate in transactions of this magnitude, Premera is left with a series of divergent and ultimately self-contradicting arguments against intervention. First Premera asserts that Applicant-Intervenors' interests are already covered by the Insurance Commissioner's staff and experts; then it argues Applicant-Intervenors' interests are too general (when challenging the interests of consumers); and finally, it asserts that Applicant-Intervenors' interests are too narrow and specialized (when challenging the interests of providers). In Premera's view, no one is "just right." The fatal weakness of this position is that it renders the intervention provisions of the Holding Company Acts a nullity, since no group or individual would ever be able to qualify for participation in an adjudicative hearing. See Nisqually Delta Ass'n v. City of DuPont, 95 Wn.2d 563, 568, 627 P.2d 956, 959 (1981) (statutes should not be construed so as to render any term meaningless). Clearly the legislature contemplated that there are groups that are likely to have a significant interest in a transaction reviewed under the

¹² <u>See</u> Press Release, <u>Kreidler Responds to Premera Blue Cross Reorganization</u>, May 31, 2002 available at http://www.insurance.wa.gov/.

Holding Company Acts, and just as clearly (as is shown by the experience in other states) this is exactly the kind of transaction in which intervention is called for.

B. Applicant-Intervenors are "aggrieved" persons and are entitled to participate in the adjudicative hearing.

In addition to the specific intervention rights conferred on Applicant-Intervenors under RCW 48.31C.030, Applicant-Intervenors are entitled to participate as full parties in the adjudicative hearing because they are aggrieved by the possibility that the Commissioner's determination regarding Premera's conversion proposal will prejudice their interests.

Premera asserts that Applicant-Intervenors do not have a right to an administrative hearing as "aggrieved" persons because a person cannot be aggrieved except by a final order and/or after an adjudicative proceeding has been held. Premera Opposition at 36. Premera is incorrect. The Insurance Code establishes the right of aggrieved persons to an adjudicative hearing on any action, threatened action, or failure to act by the Insurance Commissioner. RCW 48.04.010; 48.31B.070; 48.31C.140. Specifically, RCW 48.04.010, which is titled "Hearings – Waiver – Administrative law judge." states in pertinent part:

(1)...The [insurance] commissioner shall hold a hearing ...

(b) Except under RCW 48.13.475, upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, or by any report, promulgation, or order of the commissioner other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

Under this provision, persons who are "aggrieved" by an "order on a hearing of which such a person was given actual notice" are expressly excluded from the group of aggrieved persons on whom the statute confers a right to a hearing. Without a doubt, the Applicant-Intervenors have

notice of the adjudicative hearing in which the Commissioner threatens to approve Premera's proposed conversion. Consequently, the Applicant-Intervenors must act now, in order to assert their right to an administrative hearing as "aggrieved parties" under RCW 48.04.010, or they will lose their right to an administrative hearing entirely.

Moreover, the Insurance Commissioner has already entered a final order identifying the jurisdictional basis for the adjudicative hearing to include RCW 48.04.010, in addition to the hearing requirements under the Washington Holding Company Acts, thus consolidating the two proceedings. First Case Management Order at 2. The Insurance Commissioner clearly has the authority to consolidate the hearings on Premera's proposed conversion. RCW 34.05.449 (1); WAC 10-08-085. Moreover, no objection to the jurisdictional basis of the adjudicative hearing was filed within the relevant timelimits. Accordingly, the Insurance Commissioner's First Case Management Order finding that this hearing is being held in part pursuant to RCW 48.04.010 is now the law of the case.

C. Applicant-Intervenors satisfy the requirements under the Administrative Procedures Act to qualify for intervention.

Both the OIC Staff and the Premera assert that the Administrative Procedure Act (APA) further narrows intervention under the Holding Company Acts. RCW 34.05.443.¹³ If the APA requirements apply, Applicant-Intervenors meet the legal standard for intervention. Under

¹³ Some of the Applicant-Intervenors do not concede that the APA, a statute of general applicability, may properly limit the broader substantive criteria for intervention and the lack of restrictions on intervenors' ability to participate in the adjudicative proceeding mandated in the Holding Company Acts, which are later-drafted and more specific statutes. See General Tel. Co. of Northwest, Inc. v. Utilities & Transp. Comm'n, 104 Wn.2d 460, 464, 706, P.2d 625 (1985) (specific statute supersedes a general statute when both apply).

RCW 34.05.443, parties seeking to intervene in an administrative hearing must demonstrate that (1) Applicants for intervention qualify under any provision of law; (2) the intervention sought is in the interests of justice; and (3) intervention will not impair the orderly and prompt conduct of the proceedings. As noted above, Applicant-Intervenors meet the first standard under the APA, by demonstrating that under the Holding Company Acts, they have a significant interest affected by the transaction. RCW 48.31C.030(4); 48.31B.015(b).

1. The interests of justice are served by permitting Applicant-Intervenors' participation.

The OIC Staff suggest that an analysis of whether it is in the "interests of justice" to allow the Applicant-Intervenors to participate should focus on the public interest served by assuring the availability of all relevant information to the decision maker. OIC Staff Response at 11. Applicant-Intervenors agree that this provides one basis for finding that the interests of justice would be served by permitting intervention, and that they fulfill this criterion. Applicant-Intervenors' different perspectives and expertise will bring additional, useful information to the Insurance Commissioner to assist him in making his determination regarding the conversion proposal.

However, this is not the only reason that granting the Applicants' motion to intervene serves the interests of justice. As the New Mexico Attorney General argued in support of a coalition of consumer groups' motion to intervene in the state administrative proceeding on New Mexico Blue Cross Blue Shield's proposal to convert from non-profit to for-profit status,

The proposed acquisition of NMBCBS [New Mexico Blue Cross Blue Shield substantially and specifically affects every New Mexican who has, wants or needs health care. Virtually all New Mexicans will ultimately be affected by what happens here. The Attorney General believes that the public interest is best served by allowing a full and active participation by the public interests groups in this

proceeding. All of the entities which have sought intervention should be allowed to intervene and participate in this proceeding. Closing the doors to the public can only invite distrust in the process and invite intervention through litigation which will cause far more delay than would permitting intervention in the first instance.

Attorney General's Reply to Joint Response of Health Care Service Corporation and new Mexico Blue Cross and Blue Shield to Motions to Intervene, ¶3, pp. 2-3, attached as Exhibit 2 to Declaration of Eleanor Hamburger. (Emphasis added). The public interest is strongly served by allowing the broadest range of constituencies to participate in the adjudicative hearing to the maximum extent possible.

In response, Premera argues without citation to authority that it would somehow be unfair to the "unrepresented members of the public" to allow Applicant-Intervenors to participate in the adjudicative hearing process. Premera Opposition at 3. This defies both law and logic. It would again render meaningless the provisions of the Holding Company Acts creating a right to intervention in such proceedings because, under Premera's argument, providing any person or agency the right to intervene would inevitably be "unfair" to other non-intervening persons of divergent views. Premera's apparent solution – that **no one** ever be permitted to intervene—is patently at odds with the Legislature's intent. Premera wrongly implies that, by moving to intervene, the Applicant-Intervenors are gaining an advantage not available to others, but fails to recognize not only that others may have chosen not to intervene but also that the Applicant-Intervenors do represent the interests of a very large portion of the citizens of Washington and Alaska and of those who provide health care to those citizens.

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2. Applicant-Intervenors' participation will be efficient and will not impair the adjudicative hearing process.

Contrary to Premera's prediction of "chaos," Premera Opposition at 41-45, Applicant-Intervenors' involvement in the adjudicative process has been orderly, efficient and wellcoordinated, despite the broad spectrum of constituencies and interests represented by the groups. Applicant-Intervenors all timely filed for intervention.¹⁴ The groups have coordinated together to submit a single brief on Premera's Objection to the First Case Management Order, and to minimize any duplication of legal arguments with this Joint Reply. The Applicant-Intervenors have jointly formulated and sent to the OIC Staff a proposed plan to streamline and coordinate discovery and participation in the adjudicative hearing. Declaration of Eleanor Hamburger, Exhibits 3 and 4. Applicant-Interveners fully expect to continue to participate in the same cooperative and efficient spirit that they have already exhibited.

Additionally, the Applicant-Intervenors intend to provide additional helpful information for the Insurance Commissioner to consider in his deliberations on the Premera proposal. The Premera Watch Coalition and possibly some of the Alaska consumer groups plan to commission a health impact evaluation to study the potential impact of the conversion on different aspects of the health system. The Premera Watch Coalition intends to hire the Health Policy and Analysis Program of the University of Washington to conduct the independent, objective study.

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¹⁴ Premera relies upon WUTC v. US West Communications, Inc., 1997 Wash. UTC Lexis 71, at 5 (1997) for the premise that sometimes intervention may be limited to preserve the orderly and prompt conduct of the proceedings. Premera Opposition at 45. That case involved the rejection of an application for intervention filed <u>late</u>, beyond the established timelines. <u>Id</u>. In this case, all of the Applicant-Intervenors filed timely, some even before the Insurance Commissioner established timelines, in order to protect their significant interests.

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Declaration of Eleanor Hamburger at 2. The Hospital Associations also are prepared to hire an expert to study the impact of the conversion on hospitals. <u>See</u> Declaration of Claudia Saunders at 2. This additional information will enhance, not impair, the process.

D. A Pre-Hearing conference on Discovery should be convened to determine any limitations on discovery proceedings.

Applicant-Intervenors agree with the OIC Staff suggestion to convene a pre-hearing conference to discuss whether any limitations on discovery are appropriate. Applicant-Intervenors have already suggested some discovery limitations to the OIC Staff and would welcome the opportunity to discuss a plan for efficiently managing discovery with the representatives of Premera and the Insurance Commissioner. See Declaration of Eleanor Hamburger, Exhibits 3 and 4. For example, Applicant-Intervenors believe that by sequencing discovery, setting a presumptive limit on the number of depositions a party may note (as permitted in Fed. R. Civ. P. 30 (a)(2)), establishing guidelines that permit a party to timely object to a deposition notice, and allowing the parties to address any concerns in good faith in a discovery conference, any concerns regarding the efficiency of discovery proceedings may be fully addressed. Applicant-Intervenors maintain that it is premature to assume that depositions may prove so significantly burdensome as to warrant eliminating the availability of depositions unless subject to showing of good cause as determined by the Commissioner (as suggested in the alternative in the OIC Staff Response at 14).

Additionally, Applicant-Intervenors understand that some of the documents they may request will be proprietary in nature, and they are willing to discuss appropriate terms for a protective order, as has been used in other jurisdictions in which consumer and provider groups

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have been granted intervenor status in conversion hearings. Declaration of Eleanor Hamburger, Exhibit 3.

III. CONCLUSION

Applicant-Intervenors request that the Insurance Commissioner permit their intervention in the adjudicative hearing as full parties and convene a pre-hearing conference to discuss appropriate limitations on discovery. Applicant-Intervenors request that they be combined into four groups (Washington Consumer and Provider group, Hospital Associations' group, Alaska group and the Washington Physicians group), or in certain instances, be allowed to remain as separate parties, for the purposes of discovery. As has been demonstrated by previous coordinated activities, Applicant-Intervenors will make every effort to avoid duplication and promote efficiencies in the proceedings.

Dated this 20th day of December, 2002.

Respectfully submitted by:

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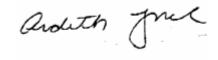
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